



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**SUCCESSION CAUSE 7 OF 1990**

***IN THE MATTER OF THE ESTATE OF MUNUHE MIRERA MAINGI (DECEASED)***

***And***

**DAVID MUCHIRI MUTHIGANI.....PROTESTER**

***Versus***

**JULIUS MAINA MUNUHE.....APPLICANT**

**RULING**

Following the death of **Munuhe Mirera Maingi** on 11<sup>th</sup> February, 1988 hereinafter referred to as “*the deceased*”, **David Muchiri Muthigani** describing himself as the stepson of the deceased petitioned for the grant of letters of administration intestate. This was on 21<sup>st</sup> March, 1990. In the affidavit in support thereof he stated that he was the only person who survived the deceased. He indicated as well that the deceased had only one asset, land parcel **Othaya/Itemeini/600** hereinafter referred as “*the suit premises*”. The petition was objected to by **Julius Maina Munuhe** claiming that he was the rightful administrator of the estate of the deceased reason being that he was the son of the deceased. He also stated that the deceased did not hold the suit premises in trust for anybody. As required he contemporaneously with the filing of the objection filed also petition by way of cross-petition. In the affidavit in support, **Julius Maina Munuhe** deponed that the deceased to whom the proceedings related was his father. The deceased left behind the suit premises to his wife and children. The suit premises were not inherited, instead the deceased bought the same with his own resources. That the deceased left the following surviving him:-

- (a) Jenaider Wanari Munuhe – wife**
- (b) Daniel Muchemi Munuhe – son**
- (c) George Mirera Munuhe – son**
- (d) Julius Maina Munuhe – son**
- (e) Florence Nyaguthi munuhe – daughter**
- (f) Regina Wairimu Munuhe – daughter.**

**David Muchiri Muthigani** swore an affidavit response to **Julius Maina Munuhe's** said affidavit. In pertinent paragraphs he deponed that the deceased was his uncle since he was a younger brother to his father. That his father died during emergency. That during land consolidation and demarcation, the land belonging to their family was consolidated and registered in the name of the deceased being the suit premises. The deceased thus held the suit premises in trust for himself and other family members including his father and his children.

On 19<sup>th</sup> September, 1990 by consent of the parties, “**all matters in dispute referred to arbitration before the D.O Othaya to act as the Chairman. Each party to elect two elders....**” That order was made by **P.K. Tunoi J** (as he then was). Subsequently the award was filed and read to the parties on 14<sup>th</sup> October, 1993. The award was to the effect that “**...We award this land to Julius Maina Munehe because his father Munehe mirara had bought this land....**” **David Muchiri Muthigani** was not happy with the award. Accordingly by an application dated 9<sup>th</sup> November, 1993 he sought to have it set aside on grounds of misconduct as well as being filed out of time. The application was resisted. However on 14<sup>th</sup> march, 1994, the award was set aside by **Ang'awa J**. Thereafter the cause lay in limbo until 25<sup>th</sup> October, 2005 when temporary grant was issued jointly to both **David Muchiri Muthigani** and **Julius Maina Munuhe** by **Khamoni J**.

On 6<sup>th</sup> June, 2007, **Julius Maina Munene**, hereinafter referred to as the applicant filed an application for confirmation of grant and proposed that the suit premises be shared equally between **George Mirera Munuhe, Julius Maina Munuhe** and **Jenaidy Wangari Munuhe**. That application was met with stiff resistance by **David Muchiri Muthigani** hereinafter referred to as “*the Protester.*” In an affidavit of protest filed on 13<sup>th</sup> July, 2007, the protester merely reiterated what he had stated earlier in a replying affidavit to the applicant's objection referred to elsewhere in this ruling.

On 20<sup>th</sup> July, 2007, **Kasango J** gave directions that the issue of whether the protestor is entitled to a share of the estate of the deceased be heard by way of viva voce evidence. On 14<sup>th</sup> May, 2009 the hearing commenced before me. The protestor testified as follows albeit in a summary form; that the deceased was his grandfather and that the applicant was his cousin. The dispute was about distribution of the estate of the deceased. He agreed that he had not stated in his protest how he wished to have the suit premises distributed. That the applicant never consulted him when he filed the application for confirmation of grant, nor did he include him among the beneficiaries. That was the reason for his protest.

Cross-examined by **Mr. Mugo**, learned counsel for the applicant he stated that since 1964 he has been staying at Nyandarua. Before then he was staying on the suit premises. He knew that the suit premises were registered in the name of the deceased who was his paternal uncle. He was claiming what otherwise his father was entitled to from the suit premises. He also conceded though that he did not have a grant of representation to his late father's estate. He also conceded that his other brother **Paul Kariuki Muthigani** stays in Nyandarua. He knew as early as 1959 that the suit premises were registered in the name of the applicant's father. However it was so registered in trust for them as well. However his brother was not claiming a share of the same and that is why he had not mentioned him in the affidavit of protest. With that the protestor closed his case.

For the applicant, he testified and called 2 other witnesses. On his own behalf, he testified that the suit premises should be shared between himself, **George Mirera Munuhe** and their mother. The deceased was their father and owned the suit premises. He maintained that the protestor though his cousin, had never stepped on the suit premises. During the deceased's lifetime, the protestor never claimed a portion of the suit premises. The deceased bought the suit premises from **Jedraft Gathua** before demarcation and was accordingly not clan land. It was for that reason that he was seeking the dismissal of the protest with costs.

Cross examined by **Mr. Mindo**, learned counsel for the protestor, he stated that in their family there were 2 girls who were all married. They were aware and indeed approved the scheme of distribution proposed by the applicant in his application for confirmation of grant. He confirmed that the protestor had filed a cause in 1990 claiming a portion of the suit premises. The cause had even been arbitrated upon by the

D.O, Othaya who had ruled in this favour.

The next witness was the mother to the applicant. She reiterated what the applicant had testified to. **Mr. Mindo** did not see the need to cross-examine her. The final witness called was **Gerald Kiiru**, a member of the deceased's clan. He confirmed that the deceased bought the suit premises from one, **Gathua**. Accordingly the suit premises did not belong of the clan. Neither was it family land. With that the applicant closed his case.

Subsequent thereto, parties agreed to file and exchange written submissions. This was done and I have had occasion to read and consider them. The issue for determination by this court in this dispute is fairly simple and straightforward; whether the protestor is entitled to a share of the estate of the deceased.

It is common ground that the suit premises are registered in the name of the deceased who was the father of the applicant. It is also common ground that the protestor is not son of the deceased. Rather he is a nephew of sorts, being a son of the deceased's elder brother. It is also common ground that the protestor and his brother have since 1963 not stepped on the suit premises. It is also common ground that they all stay in Nyandurua. It is also common ground that the protestor and his brother never claimed a portion of the suit premises during the life time of the deceased. They only raised their stakes following the death of the deceased. Finally it is common ground that this dispute was once upon a time ago referred to arbitration by the D.O. Othaya. The arbitration award was subsequently filed in court and read to the parties. The award was to the effect that the land belongs to the applicant as this father had bought it. Much as the award was later set aside, it still remains part of the record in this cause and a reference can be made to it. The mere setting aside of the award did not mean that it was expunged from the record in other words.

In his affidavit of protest, the protestor seem to be saying that he was pushed to protest because he had not been consulted by the applicant in connection with distribution. Consultation or lack of it perse cannot be a basis for revocation of a confirmed grant. However reverting to his evidence and the replying affidavit sworn in response to the applicant's objection, it would appear that the protestor's claim to a portion of the deceased estate is anchored on the fact that the suit premises was family land which initially belonged to the deceased's and his father's father. In other words the suit premises was family land but was registered in the name of the deceased to hold in trust for himself and his family as well as the protestor's father's family. The protestor's father had passed on during the estate of emergency and before land consolidation and demarcation. His claim therefore was what his father would otherwise have been entitled to following land consolidation and demarcation.

I am aware and I take judicial notice that it was common practice during land consolidation and demarcation for a son of a family to be registered as proprietor of the family land in trust for himself and the other members of the family. However for a court to be able to make such finding it must be guided by credible and cogent evidence. The protestor herein never led any evidence that would satisfy the court that indeed the suit premises comprised their grand father's fragments of land that were consolidated and demarcated during the land consolidation and demarcation in the area around about 1958. Other than such bare allegation, the protestor did not call any other evidence to back up his claim. There must have been clan elders or members who were alive and who would have been able to attest to that fact. He never saw the need to have them testify. In any event, he was not present during the said land consolidation and demarcation. Accordingly what he was testifying to was purely hearsay, the kind of evidence that a court of law cannot be called upon to act.

The protestor agreed that he used to stay on the suit premises until about 1963 when he relocated to Nyandurua. Since then he had never claimed a portion of the suit premises in the lifetime of the deceased. The protestor did not tell the court the circumstances under which he vacated the suit premises and relocated to Nyanduarua where he resides to date. Is it because he had been told by the deceased that the suit premises was not clan or family land and that he should go out there and look for his own land. That possibility looms large. How else can one explain the fact that the protestor and his brother all relocated to Nyandarua without as much as insisting that a portion of the suit premises thereof be reserved for them as their inheritance. Further throughout the lifetime of the deceased, they never approached him

for the share of the suit premises that their father was otherwise entitled to. If they had made such claim or indeed their relocation to Nyanduarua was involuntary, it would definitely have come out in the evidence of the protester.

On the other hand, there is the evidence of the applicant as to how the deceased acquired the suit premises which is credible and believable. At least it was backed by the evidence of a clan member. The evidence of the applicant is that the deceased acquired the suit premises with his own resources from one **Jedraf Gathua**. This evidence was not seriously challenged. Indeed the two witnesses were not even subjected to any cross-examination on the issue. That being the case it must be taken to be true. The suit premises are therefore neither family nor clan land that the protestor can in law stake a claim over it on behalf of his deceased father.

I do not even think that the protestor is a witness of truth. In his petition for the grant of letters of administration intestate, he had described himself as a stepson to the deceased knowing very well that, that was correct. Further, he also went ahead to lie that the deceased passed on and left him as the sole surviving beneficiary. He knew that the deceased had a wife and children. That he was able to so blatantly lie, what else has he not lied to in this cause.

Even assuming that the indeed, the suit premises were family and or clan land, does the protester have locus standi to claim the same? I do not think so. In his evidence, the protester stated that he was claiming a portion of the suit premises on behalf of his father. However his said father passed on during state of emergency. He however admitted that he had not obtained any grant of representation, limited or full in respect of his late father's estate. That being the position, the protester has no locus standi to lodge a claim on behalf of his late father. In any event, I do not think that if his father's claim is based on family trust, these proceedings will be the appropriate forum in which to ventilate and canvass the claim.

As I have previously stated, this cause was the subject of arbitration. Much as the award was subsequently set aside, it does not mean that reference cannot be made to those proceedings and award in order to appreciate fully the essence of this dispute. I have carefully read and considered those proceedings. Indeed they support the applicant's case. I do not think I need say more.

The conclusion I have come to is that the protester has not made out a case to show that he is entitled to inherit a portion of the deceased's estate. Accordingly, his protest is dismissed with costs to the applicant. Otherwise the application for confirmation of grant dated 27<sup>th</sup> May, 2007 and filed in court on 6<sup>th</sup> June, 2007 is allowed.

***Dated and delivered at Nyeri this 30<sup>th</sup> day of June, 2009.***

**M.S.A. MAKHANDIA**

**JUDGE**